No. 99-138

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,
Petitioners,

v.

TOMMIE GRANVILLE,
Respondent.

BRIEF *AMICUS CURIAE* OF THE SOCIETY OF CATHOLIC SOCIAL SCIENTISTS IN SUPPORT OF RESONDENT

Filed December 10, 1999

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

TABLE OF AUTHORITIES – Continued

Page

CHURCH DOCUMENTS AND PAPAL ENCYCLICALS:

OTHER SOURCES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICUS CURIAE*[1]

The Society of Catholic Social Scientists ("SCSS") respectfully submits this *amicus curiae* brief in support of the Respondent, Tommie Granville. We believe the question presented in this case has serious implications for American law and public policy relating to the rights of parents, the integrity of the family, the freedom of religion, and the powers of government.

SCSS is an interdisciplinary association of Catholic social scientists. Its purposes are to pursue and produce knowledge about the social order; to evaluate contemporary social-science work in light of Catholic social teachings; to apply these teachings to the challenges posed by modern society; to encourage distinctively Catholic scholarship in the social sciences; and, where appropriate, to put the tools of social science at the service of the Church's evangelizing mission. These purposes reflect and respond to Pope Pius XI's call over 50 years ago for "the building up of a true Catholic social science." Pope Pius XI, *Reconstructing the Social Order* 19-20 (1931).

The SCSS publishes the only interdisciplinary Catholic social-science journal in North America – *The Catholic Social Science Review* – as well as other research-oriented

---

[1] The parties have consented to the filing of this *amicus curiae* brief. Letters to this effect have been filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief. *See* S. Ct. Rule 37.6.

publications;[2] sponsors periodic conferences and symposia; issues statements and papers on important social and political questions; recognizes and awards outstanding contributions to a distinctively Catholic approach to the social sciences; and assists students who are interested in integrating social-science careers with the faith and tradition of the Catholic Church.

SCSS is particularly interested in protecting, through research, scholarship, and advocacy, the dignity and rights of the family. This commitment reflects the Catholic Church's position that the family is "the first and vital cell of society" and that "[i]t is from the family that citizens come to birth and . . . find the first school of the social virtues that are the animating principle of the existence and development of society itself." Vatican Council II, *Decree on the Apostolate of Lay People* 11 (1965). We follow the Catholic Church – and the precedents of this Court – in believing that it is "a grave and pernicious error" to think that government "should at its option intrude into and exercise control over the family" and in holding that such intervention is justified only when "there occur grave disturbances of mutual rights." Pope Leo XIII, *The Condition of Labor* 14 (1891). It is, in other words, a fundamental principle both of Catholic social teaching and of constitutional law that "the child is not the mere creature of the state." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *see also, e.g., Catechism of the Catholic Church* Sec. 2202 (The family is "prior to any recognition by public authority").

[2] *See, e.g.*, Stephen M. Krason & Paul C. Vitz, *Defending the Family: A Sourcebook* (1998).

SUMMARY OF THE ARGUMENT

The fundamental rights of parents to direct and control the upbringing of their children and the autonomy of the family have been recognized time and again by this Court. These rights and this autonomy are not creatures of positive law, but are grounded in the natural moral order. The family is the "building block" of civil society and has as its natural end, or *telos*, the nurturing and development of flourishing human persons and good citizens. Given this natural purpose, the rights of the family and of parents to pursue this end must be respected and protected by public authority. In particular, government must not disrupt, intervene in, or second-guess parents' decisions about child-rearing except in grave cases where it is necessary to prevent real harm.

The history of our Nation's various child-welfare, or "child saving" movements serve as a warning against excessive government intrusion into parents' decisions, even when such intrusion purports to be motivated by noble goals. There is always the danger that religious, ethnic, cultural, or class-based prejudice will color the "experts' " view of the "best interests" of the child and of parents' competence. Such prejudice clearly tainted the efforts of the early juvenile-justice reformers. In addition, the current sensationalism surrounding the problem of child neglect and the abuses of the child-neglect-reporting system during the last thirty years provide further basis for caution when it comes to second-guessing parents in the name of "child protection." Given what we know about the costs of, and harm caused by, overzealous intrusion in the family and unsubstantiated reports of abuse, this is certainly not the time for this Court to in

any way undermine the *fundamental* nature of parents' constitutional rights.

ARGUMENT

I.

The Government Should Not Second-Guess or Interfere with the Decisions of Competent, Non-abusive Parents Concerning the Education, Upbringing, and Welfare of Their Children.

This Court has held and re-affirmed that the rights of parents to direct and control the upbringing of their children without unjustified intrusion or oversight by the State are fundamental and sit at the heart of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. As this Court observed in *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), "[t]he history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of the children is now established beyond debate as an enduring American tradition." Indeed, parents' rights and family autonomy are not merely "enduring American tradition[s]," but are "essential, basic rights of man." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). It is therefore "cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Ibid.*; *see generally, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Santosky v. Kramer*, 455 U.S. 745 (1982).

We believe that the constitutional pedigree of parents' rights are well established, as is the rule that any law that infringes on these rights must be narrowly tailored to serve a compelling state interest. In this *amicus curiae* brief, we hope to assist the Court by focusing on *foundational* arguments that are consonant with, and provide additional support to, the relevant constitutional principles.

A. The Foundations of Parents' Rights.

Common sense and human experience reveal that parents' responsibility for and right to direct the upbringing of their children are not merely conventions, but are grounded in the natural order of things. *See, e.g., Catechism of the Catholic Church* Sec. 2207 ("The family is the *original cell of social life.*") (emphasis in original). These objective facts supply parents with the moral right to exercise their authority – within the limits of reason and morality – free from unwarranted interference by outsiders, including government. *See id.*, at Sec. 2209 ("[L]arger communities should take care not to usurp the family's prerogatives or interfere in its life."); *see also, e.g.*, John Locke, *Two Treatises of Government* 348-49 (Peter Laslett ed., 1960) (3d ed. 1698) ("The power . . . that parents have over their children arises from that duty which is incumbent on them, to take care of their offspring during the imperfect state of childhood.").

These claims are neither novel nor sectarian. Philosophers have long recognized that the family is the fundamental "building block" of human society: "Nature has

instituted this small but fundamental group, first of the natural societies and the most basic unit of the state, for the purpose of reproducing the human species." Rafael T. Waters, "The Basis for the Traditional Rights and Responsibilities of Parents," *in* Stephen M. Krason & Robert J. D'Agosino, eds., *Parental Rights: The Contemporary Assault on Traditional Liberties* 20 (1988). Moreover, "the family is the necessary productive unit requiring the complementary abilities, personalities, and contributions of both parents so that the child can learn and develop habits . . . and moral virtues." *Id.*, at 22. The purpose, or *telos*, of the family imposes duties upon parents to accept and exercise responsibility for the process of producing – of *creating* – new persons and new members of civil society. *Id.*, at 22-23; *see also Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) (Constitution protects the integrity of the family because of "the role it plays in 'promoting a way of life' through the instruction of children"). This end toward which the family – the primary natural association – is directed is the basis for the moral rights and responsibilities of parents.[3]

Parents' natural moral duties, obligations, and responsibilities carry with them moral rights which the state is obligated to respect and protect. This is because the imposition of a moral duty on a person requires permitting that person to comply with it, and one person's enjoyment of a moral right imposes a duty on other

[3] On the notion that the natural *telos* or "end" of a thing is the lodestar for moral claims *about* that thing, *see, e.g.*, Aristotle, *The Nicomachean Ethics* Book VII, c.8, 1115a; St. Thomas Aquinas, *Summa Theologica* I-II, q. 90, a.1.

persons to respect that right. *See* Pope John XXIII, *Peace on Earth* 28-29 (1963); Thomas J. Higgins, *Man As Man: The Science and Art of Ethics* 226-227 (1992); *see also Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("[O]ur constitutional system . . . [has] asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.") (citations and internal quotation marks omitted). Parents' rights, then, are grounded in the fact that their natural moral obligations "cannot be met without the possession of rights with respect to other members of the community." Waters, *supra*, at 25.

Again, the natural purpose of the family, and therefore the obligation of parents, is to create, shape, and nurture new members of the human family and the civic community. Parents and families are not only morally entitled, but are *by nature* better able, to carry out these tasks than is any other entity or institution:

> The mutual love of the parents, the aid they can give to each other and the intimacies they share, are all a proper climate for the [child]. . . . The struggle for its due completion which every being seeks . . . is culminated best in family life where there exist two people who love the offspring, more than anyone else can, by a deeply ingrained attitude established in the nature of the parents. . . . His parents love him more than . . . the state possibly could love him. Therefore, they are best fitted to supervise the development of their own offspring.

Waters, *supra*, at 26-27; *see also Parham*, 442 U.S. at 602 ("[H]istorically it has been recognized that natural bonds of affection lead parents to act in the best interests of

their children.") (citations omitted).[4] This common-sense fact is not surprising. *See Smith*, 431 U.S. at 844 (noting the "emotional attachments that derive from the intimacy of daily association"). As Pope John Paul II has observed, "public agencies . . . are dominated more by bureaucratic ways than by concern for serving their clients. . . . It would appear that needs are best understood and satisfied by people who are closest to them." Pope John Paul II, *The Hundredth Year* 48 (1991).

It follows that the state violates a fundamental moral principle, upsets the proper ordering of civil society, and undermines the natural end of the family when it substitutes its judgment for parents', except where absolutely necessary, in special and difficult circumstances. *See Catechism of the Catholic Church* Sec. 2209 ("The family must be helped and defended by appropriate social measures. *Where families cannot fulfill their responsibilities*, other social bodies have the duty of helping them and of supporting the institution of the family."). This is the heart of the principle of *subsidiarity*, which holds that "[i]t is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do." Pope Pius XI, *supra*, at 79; *see also* E.F. Schumacher, *Small is Beautiful: Economics as if People Mattered* 244

[4] These are, obviously, general principles. *Of course* it is true that *some* parents may be unable or unsuitable to raise their children, but this fact does not undermine the suitability and rights of parents, as a general matter, to direct and control the upbringing of their children.

(1973).[5] The subsidiarity principle applies to family-state relations as well as to relations between different levels of government: "Following the principle of subsidiarity, larger communities should take care not to usurp the family's prerogatives or interfere in its life." *Catechism of the Catholic Church* Sec. 2209.

Not only do parents enjoy a superior right to the state in raising their own children, they must enjoy such a right with respect to private third parties – even well-meaning, capable, and loving third parties. Even extended family members do not share the same natural intimacy with children that parents do. The bond between children and their extended family is, of course, real and precious and – all things being equal – this bond should be cultivated and nurtured. But this bond is simply not interchangeable, either in biology or in moral right, with that between parents and their children. The integrity of the family and the rights of parents are fundamental, objective, and natural facts, and the state should set itself against them only in cases of the gravest need.

[5] This principle of subsidiarity overlaps considerably with and promotes many of the same goods as does our constitutional federal system of dual sovereignty. *See, e.g.*, W. Gary Vause, "The Subsidiarity Principle in European Union Law – American Federalism Compared," 27 Case W. Res. J. Int'l L. 61 (1995); George A. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States," 94 Colum. L. Rev. 331 (1994).

B. The History and Tradition of Parents' Rights.

The philosophical arguments sketched above have been embraced in our legal tradition. It is well established that "parental rights were ardently upheld at common law." John W. Whitehead, *Parents' Rights* 85 (1985). Indeed, "the common law recognized parental rights as a key concept . . . [and viewed] the family as a basic social, economic, and political unit"; parental rights were "even more fundamental than property rights." Bruce C. Hafen, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their 'Rights,' " 1976 B.Y.U. L. Rev. 605, 615. As one court proclaimed, nearly 150 years ago:

> No teacher . . . has any authority over the child, except what he derives from its parent or guardian; and that authority may be withdrawn whenever the parent, in the exercise of his discretionary power, may think proper. . . . The doctrines of the common law are in accordance with these principles. It is the duty of the parent to maintain and educate the child, and he possesses the resulting authority to control it in all things necessary to the accomplishment of the parent over the child, except that it must not be exercised in such a manner as to endanger its safety or morals.

Commonwealth v. Armstrong, 1 Pa. L.J. Rep. 393, 395-397 (1842). In our legal tradition, parents' rights have long been recognized as "inherent, natural right[s], for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and the pursuit of happiness, our government is formed." *Lacher v. Venus*, 188 N.W. 613, 617 (Wis. 1922). This longstanding

solicitude for parents' rights does *not*, we submit, simply reflect a notion of children-as-property,[6] but rather a commitment to the role of the family as the fundamental and autonomous unit of civil society, within which parents and their authority are protected precisely in order that they may discharge their obligations to their children *and to the greater common good*.

It is important to recognize in this regard that our tradition, while committed to preserving family autonomy, rejected the extreme position taken in more ancient legal systems – in particular, the Roman doctrine of *paterfamilias* – which gave fathers complete control over the life and death of their children. As Blackstone put it, "[t]he power of a parent, by our English laws, is much more moderate; but still sufficient to keep the child in order and obedience. He may *lawfully* correct his child, being under age, *in a reasonable manner*; for this is for the benefit of his education." 1 William Blackstone, *Commentaries on the Laws of England* 440 (Oxford Reprint 1966). That said, American courts for most of our history recognized that "[p]arental power . . . is essentially plenary. This means it should prevail over the claims of the state, other outsiders, and the children themselves 'unless there is some compelling justification for interference.' " Whitehead, *supra*, at 91-92.

---

[6] *Cf.* Barbara B. Woodhouse, "Who Owns the Child: *Meyer* and *Pierce* and the Child as Property," 33 Wm. & Mary L. Rev. 995, 997 (1992) ("*Meyer* and *Pierce* constitutionalized a narrow, tradition-bound vision of the child as essentially private property.").

The traditional rationale and foundation for the respect accorded parents' rights in our constitutional tradition reflects not only the Framers' libertarian commitment to natural, individual rights, but also their republican recognition that the family is the basis for society and the seed-bed of civic virtue. *See* Higgins, *supra*, at 428 (The family is the "the cell of society, biologically and morally; that is, future citizens are prepared for life in society by the family . . . [T]he family is first among natural societies."). It is families, and not de-contextualized, atomistic individuals, that contribute most meaningfully to civil society, because individual citizens' identities, morality, and consciousness originate in, and are nurtured by, the family.

These claims accord not only with Catholic teaching but with Western traditions generally. Aristotle identified the importance of the family to the creation of civic virtue and political well-being over 2,300 years ago. And, as was suggested above, this ancient, foundational commitment to family integrity – grounded in the natural law – continued in our common-law and constitutional traditions. *See generally* Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 Harv. L. Rev. 149 (1928); Russell Kirk, *The Roots of American Order* (1974) (outlining roots of America's constitutional heritage in the ancient and medieval natural-law traditions).

It is, of course, not this Court's task to expound and apply the natural law. But this Court's properly limited role does not detract from the historical fact that natural-law principles and reasoning were absorbed into our Constitution's guarantees and into the claims of the Declaration of Independence. And as they were absorbed,

they were refined. This Court need not be concerned that, because of their natural-law basis, parents' rights are vague, subjective, or nonjusticiable. They are not. The deeply rooted, traditional protections accorded parents' rights and family integrity are well-established, and their outlines no less clear than those of the other fundamental rights protected by the Constitution.

* * *

We believe that the decision of the Washington Supreme Court below, which resoundingly held that the "family entity is the core element upon which modern civilization is founded" (Pet. 14a), and therefore that "the state may interfere [with the constitutional right to rear one's child and the right to family privacy] only 'if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens,' *Yoder*, 406 U.S. at 234" (Pet. 17a), was correct and should be affirmed. We have attempted to show that our commitment to the integrity, dignity, and autonomy of the family as the fundamental unit of civil society, charged with the solemn duty of producing well formed citizens and human persons, is one that coheres fully with and has been embraced by this Nation's legal traditions.

II.

Parents' Rights and Family Integrity Are Being Undermined by Certain Trends in Contemporary American Law and Policy and This Court Should Therefore Reaffirm That These Rights Are Fundamental.

Because parents' rights to direct the upbringing of their children are fundamental, any States' laws that limit

these rights must undergo strict judicial scrutiny. We agree with the Washington Supreme Court that the broad third-party visitation laws at issue here cannot survive this Court's review.[7] In what follows, we attempt to bring to this Court's attention certain social trends that make all the more crucial a clear re-affirmation of the fundamental nature of the rights this Court vindicated in *Pierce, supra,* and *Meyer, supra.*[8]

A. The *Parens Patriae* Doctrine and the "Child Savers."

The rights of parents have never been *absolute* in our tradition. *See generally,* Allan C. Carlson, *Family Questions: Reflections on the American Social Crisis* 242 (1988) ("[A]longside th[e] affirmation of parental rights, the law also recognized the power of the courts to intervene into families and take away children in order to the protect the interests of the larger community."). As the court below recognized, family integrity is subject to the state's

[7] We do not believe this Court needs to decide whether a more cautious and less intrusive "grandparent-visitation" law could survive strict scrutiny.

[8] Some commentators have suggested that *Pierce* and *Meyer,* and the fundamental rights they upheld, are no longer useful in today's society. *See, e.g.,* Abner S. Greene, "Why Vouchers Are Unconstitutional, and Why They're Not," 3 Notre Dame J. of Law, Ethics, and Pub. Pol'y 397 (1999); Stephen Arons, "The Separation of School and State: *Pierce* Reconsidered," 46 Harv. Educ. Rev. 76 (1976). We reject the dangerously statist implications of such claims.

police and *parens patriae* powers (Pet. 15a-16a).[9] These powers, when judiciously exercised in pursuit of the common good, need not undermine parents' rights. But this Court has emphasized that, precisely because of the central importance of family integrity, the state may exercise these powers only when necessary to redress or prevent real *harm* to a child. *See* Pet. 16a (citing *Yoder,* 406 U.S. at 206).

The *parens patriae* power is *not* a license for re-shaping society by second-guessing parents. We believe that certain excesses in the exercise of the *parens patriae* power today threaten parents' rights and, more broadly, the integrity, privacy, and well-being of families. These excesses – committed in the name of protecting children – have often, in fact, harmed children, not simply by exposing them to the nightmare of arbitrary government action but also by impairing their natural development, removing them from their families, and undercutting their parents' authority.

History cautions against using the *parens patriae* power to justify excessive state intervention. In the American colonial period, some local courts, following English practice, intervened in family affairs and even removed children from their parents if these courts found the

[9] The phrase *parens patriae* literally means "parent of the country." *See generally* Douglas R. Rendleman, "*Parens Patriae*: From Chancery to The Juvenile Court," 23 S.C. L. Rev. 205 (1970). The doctrine initially developed in medieval chancery courts. It was first used in an American court in the case of *Ex Parte Crouse,* 4 Whart. 9 (Pa. 1838), where the court used the term to justify the continued detention of a girl in a "House of Refuge" over the objections of her father.

parents unfit or decided that the children were not being raised in an approved manner. *See generally* Michael D. Rosenbaum, "To Break the Shell Without Scrambling the Egg: An Empirical Analysis of the Impact of Intervention Into Violent Families," 9 Stan. L. & Pol'y Rev. 409, 411 (1998) ("[L]ocal authorities had the authority to remove abused children from parental guardianship, a right to act against parents on behalf of children derived from the medieval doctrine of *parens patriae*."); Carlson, *supra*, at 242 (describing 1646 statute enacted by Virginia's House of Burgesses that authorized taking children from parents to work in flax houses). In a similar vein, the 19th Century reform-school movement promoted laws which removed delinquent or "ill-treated" children from their usually urban homes to rural reform schools. The families targeted for the "benefit" of the state's attention were typically poor immigrants. As in colonial New England, the state was viewed by some as an appropriate mechanism for re-shaping family life in the interest of a more homogenous common good. *See generally, e.g.*, Carlson, *supra*, at 243 ("The reform school movement which swept the nation during the nineteenth century represented a bonding of traditional values to coercive social engineering."); Sanford J. Fox, "Juvenile Justice Reform: A Historical Perspective," 22 Stanford L. Rev. 1187, 1206-1209 (1970); Anthony M. Platt, *The Child Savers: The Invention of Delinquency* 44-49 (1969).

The often oppressive "child saving" movement gained its strength from the *parens patriae* doctrine, which was invoked to justify removing children from their parents – with minimal procedural protections – whenever they were judged unworthy to rear their children. *See*

generally, Platt, *supra*, at 3-4, 98-99; Susan R. Bell, Comment, "Ohio Gets Tough on Juvenile Crime: An Analysis Of Ohio's 1996 Amendments Concerning the Bindover Of Violent Juvenile Offenders to the Adult System and Related Legislation," 66 U. Cinn. L. Rev. 207, 208-209 (1998) ("These civic-minded 'child savers' had a two fold agenda that included 'instilling proper civic and moral values' in these children and 'mitigat[ing] the law's often harsh treatment of children.' ") (internal citations omitted). The child-saving movement spurred the development of juvenile courts, which were given the authority to remove children from their parents' care if they determined the children were "probable delinquents." Again, it was mostly children from immigrant, poor, and various minority communities who were targeted. *See* Fox, *supra*, at 1221-1228; Mason P. Thomas, Jr., "Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives," 50 N.C. L. Rev. 293, 323-325 (1972).

The stated methodology of the early juvenile justice courts was therapeutic: parents and children were "clients" and the "the best interests of the child" was the guiding principle. In truth, though, the child-saving movement and its courts were coercive, and sought to reshape their "clients" along the lines of an ideal notion of the American family as determined by middle-class social workers and juvenile court judges. Later, they targeted not just minority groups, but all parents. *See* Carlson, *supra*, at 244-248. Not surprisingly, the "child saving" movement eventually came under criticism, and the juvenile justice system became known for its procedural nightmares, arbitrariness, and cruelty. Indeed, in

1870 the Illinois Supreme Court ruled that, notwithstanding the State's invocation of the *parens patriae* power, the constitutional rights of a 14-year old boy who had been committed to Chicago's reform school were violated: "The State, as *parens patriae*, has determined the imprisonment beyond recall. Such a restraint upon natural liberty is tyranny and oppression." *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 287 (1870). Importantly, the Illinois court grounded its decision in the observation that "[t]he parent has the right to the care, custody, and assistance of his child[.] . . . The duty to maintain and protect it is a principle of natural law. . . . Before any abridgement of the right, gross misconduct or almost total unfitness . . . should be clearly proved." *Ibid.*

Eventually, policy-makers awakened to the danger of using coercive state power, and removing children from their parents, simply to homogenize society in accord with middle-class Protestant norms. Carlson, *supra*, at 249-250; *see* Eric K. Klein, Note, "Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice," 35 Am. Cr. L. Rev. 371, 377 (1998) ("[W]hile it was hoped that the courts would protect delinquent children and serve their best interest, because of the lack of procedural protections, children accused of crimes or even status offenses were often being arbitrarily and unfairly punished."). The abuses and injustices of this system were only halted – or at least curbed – by this Court's landmark decision, *In re Gault*, 387 U.S. 1 (1967), which condemned much of the theory and practice of the "child savers" and their courts. *Id.*, at 16. *Gault* should be read as a warning against an expansive reading of the *parens patriae* power, even when

that power is being invoked by government agents, or well meaning private parties, in the service of what they assure us is a good cause.

B. Present-Day Policies Relating to Child Abuse and Neglect.

As the old, harsh juvenile justice system crumbled – or at least improved – in the wake of *In re Gault*, *supra*, a new avenue soon opened up for experts' "child saving" impulses. The "newly discovered" problem of child abuse, increased media attention to this issue, and the efforts of scholars, professionals, and activists led to a host of new laws relating to the reporting of and official response to child-abuse accusations. Between 1963 and 1967, every State and the District of Columbia enacted laws requiring reporting of child-abuse cases. *See* Rosenbaum, *supra*, at 412; Carlson, *supra*, at 250-251. Then, in 1974, Congress passed the Child Abuse Prevention and Treatment Act of 1974 (the "Mondale Act"), which opened the door to massive and unprecedented governmental intervention in American families. The Act's generous promises of federal grants prompted state and local governments to set up hundreds of child-protective agencies, ostensibly in response to the hitherto unremarked national epidemic of child abuse and neglect. States were encouraged by Mondale Act funds to pass sweeping statutes which, *inter alia*, required a range of professionals – and, in some States, all citizens – to report even suspicions of abuse to specialized child-protection agencies, and gave blanket immunity from prosecution or civil suit to persons making reports (even if false or exaggerated),

even while making those required to report liable for failing to do so. *See generally*, Douglas J. Besharov, " 'Doing Something' About Child Abuse: The Need to Narrow the Grounds for State Intervention," 8 Harv. J. of Law and Pub. Pol'y 545 (1985). These statutes typically authorized intrusive government intervention in families and investigation of parents on the basis of vague, undefined, and persistently unclarified terms like "abuse" and "neglect." *See* Stephen M. Krason, "Child Abuse: Pseudo-Crisis, Dangerous Bureaucrats, Destroyed Families," *in* Stephen M. Krason & Robert J. D'Agostino, eds., *Parental Rights: The Contemporary Assault on Traditional Liberties* 167-173 (1988).

The Mondale Act and its progeny caused a ballooning of child-abuse and neglect reports, unprecedented state intervention into the family, and – in many high-profile cases – outright destruction of families. Indeed, it is "no coincidence that [many] spectacular child abuse cases emerged shortly after the passage of the Mondale Act, which provides huge increases in funds for child protection agencies and abuse investigators. The appearance of huge amounts of government money produced enormous increases in agencies and staff, which in turn created investigations culminating in accusations of child sex abuse on a scale never seen before." James E. Beaver, "The Myth of Repressed Memory," 86 J. Crim. L. & Criminology 596, 601 (1996) (book review); *see also* Dorothy Rabinowitz, "A Darkness in Massachusetts," Wall St. J., Jan. 30, 1995, at A20; ("That the wave of spectacular child-abuse trials emerged in the 80's was no accident. . . . With the outpouring of government money came a huge

increase in agencies and staffs, which in turn begat investigations and accusations of child sex on a grand scale. An industry had been born.").

Consider these numbers: In 1963, when the first generation of (limited) abuse-reporting laws were enacted, there were 150,000 reports nationwide; by 1972, just prior to the passage of the Mondale Act, there were 610,000; in 1982 – eight years after the Act – there were 1.5 million; and by 1993, there were nearly 3 million. This is an increase of 1857% in thirty years, an increase that cannot be explained by increases in actual abuse or in a massive uncovering of secret neglect. It is now evident that many of these millions of reports were and are completely unsubstantiated. *See generally* Stephen M. Krason, "A Grave Threat to the Family: American Law and Public Policy on Child Abuse and Neglect," *in* Paul C. Vitz & Stephen M. Krason, eds., Defending the Family: A Sourcebook 235-236 (1998).

It appears, ironically, that the expansion of the government's intrusive power into the family has led to a situation even *more* dangerous for at-risk children, as the States' child-protective systems are "overburdened with cases of insubstantial or unproven risk." Besharov, *supra*, at 540; *see also* Krason, "A Grave Threat," *supra*, at 257-258. Moreover, because the post-Mondale Act statutes are often so unclear in defining "abuse" and "neglect" that estimates of the number of reports that are unfounded may *understate* the number of unfounded reports. Krason, "A Grave Threat," *supra*, at 245-250. It could well be, that is, that many perfectly acceptable

parental actions make up a good percentage of the "substantiated" or "founded" claims because agencies arbitrarily determined them to be abusive or neglectful. *See generally* Mary Pride, *The Child Abuse Industry* (1986); Brenda Scott, *Out of Control: Who's Watching Our Child Protection Agencies?* (1994).

The problem of false abuse reports is more than a statistical problem. Many good parents have endured legal difficulties, disruption of their family, social stigma and loss of job opportunities resulting from being placed in state child-abuse registries, loss of their children temporarily or permanently, and even imprisonment – all because of false neglect charges. These human costs are real, and provide a solid basis for caution in this area. *See generally*, Rabinowitz, *supra*; John Merline, "Who's Abusing America's Kids? All Too Often It's Those Trying to Protect Them," Investor's Bus. Daily, Sep. 5, 1995, at A1; Ruth Shalit, "Witch Hunt," The New Republic, June 19, 1995, at 14. Unfortunately, notwithstanding these costs, parents caught up in today's version of the "child saving" movement are often denied the procedural and other protections the Constitution affords criminal defendants as a matter of course and that this Court required in the juvenile courts in *In re Gault*, *supra*. *See generally* Merline, *supra*, at A1, ("In some cases, innocent parents' homes are searched without a warrant, the children are interrogated, strip searched, and temporarily removed from the home altogether – sometimes for years"); Pride, *supra*, at 168-169; Scott, *supra*, at 131-151; *cf. Santosky v. Kramer*, *supra*, at 755 ("When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.").

* * *

In sum, as a result of the Mondale Act and its progeny, and as a legacy of this Nation's earlier "child saving" movements and present-day media sensationalism, the State's *parens patriae* power has all too often been abused, and the admirable motives of child-protection laws undermined, by bureaucratic agencies and officials who have wrongly assumed a near-plenary power over parents' childrearing practices in the name of combating neglect. Such oppressive intrusion flies in the face of the American constitutional tradition and of the Fourteenth Amendment's "liberty" guarantee.

We emphasize that nothing said here should be taken as questioning the duty of the state to intervene in clear cases of *real* abuse and neglect. Parents' rights are fundamental, but they are not absolute. Still, given that these rights *are* fundamental, the conduct of government and its bureaucrats – whether well-meaning or malevolent – must be held to a demanding standard. The States' laws regarding child-abuse reporting, custody, termination of parental rights, *and third-party visitation* must be subject to *strict scrutiny*. In this case, the Washington Supreme Court correctly determined that, whatever may be said about the importance, generally speaking, of a child's relationship with his or her grandparents, the statutes at issue here are far too broad, and far too intrusive, to satisfy the Constitution's requirements. *See* RCW 26.10.160(3), RCW 26.09.240.

CONCLUSION

For all the foregoing reasons, *amicus curiae* the Society of Catholic Social Scientists urges this Court to affirm the judgment and reasoning of the court below.

Respectfully submitted,

STEPHEN M. KRASON
Counsel of Record
President, Society of
Catholic Social Scientists
Franciscan University
Franciscan Way
Steubenville, OH 43952
(740) 283-6416

RICHARD W. GARNETT
Of Counsel
Assistant Professor of Law
Notre Dame Law School
Notre Dame, IN 46556
(219) 631-6981

December 1999